(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF GAME OF WASHINGTON *v.* PUYALLUP TRIBE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 72-481. Argued October 10, 1973—Decided November 19, 1973*

Commercial net fishing by Puyallup Indians, for which the Indians have treaty protection, *Puyallup Tribe* v. *Dept. of Game*, 391 U. S. 392, forecloses the bar against net fishing of steelhead trout imposed by Washington State Game Department's regulation, which discriminates against the Puyallups, and as long as steelhead fishing is permitted, the regulation must achieve an accommodation between the Puyallups' netfishing rights and the rights of sports fishermen. Pp. 2-6.

80 Wash. 2d 561, 497 P. 2d 171, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., and STEWART, J., joined.

*Together with No. 72-746, *Puyallup Tribe* v. *Department of Game of Washington*.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF GAME OF WASHINGTON *v.* PUYALLUP TRIBE, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 72–481. Argued October 10, 1973—Decided November 19, 1973*

Commercial net fishing by Puyallups for steelhead, for which the Indians have treaty protection, *Puyallup Tribe* v. *Dept. of Game*, 391 U. S. 392, forecloses the bar against net fishing of steelhead trout imposed by Washington State Game Department's regulation, which discriminates against the Puyallups, and so long as steelhead fishing is permitted, the regulation must achieve an accommodation between the Puyallups' net-fishing rights and the rights of sports fishermen. Pp. 2–6.

80 Wash. 2d 561, 497 P. 2d 171, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., and STEWART, J., joined.

*Together with No. 72–746, *Puyallup Tribe* v. *Department of Game of Washington*.

SUPREME COURT OF THE UNITED STATES

Nos. 72-481 AND 72-746

Department of Game of the State of Washington, Petitioner,
72-481 *v.*
The Puyallup Tribe et al.

Puyallup Tribe, Petitioner,
72-746 *v.*
Department of Game of the State of Washington.

On Writ of Certiorari to the Supreme Court of Washington.

[November 19, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the Department of Game and the Department of Fisheries of the State of Washington brought this action against the Puyallup Tribe and some of its members, claiming they were subject to the State's laws that prohibited net fishing at their usual and accustomed places and seeking to enjoin them from violating the State's fishing regulations. The Supreme Court of the State held that the tribe had protected fishing rights under the Treaty of Medicine Creek and that a member who was fishing at a usual and accustomed fishing place of the tribe may not be restrained or enjoined from doing so unless he is violating a state statute or regulation "which has been established to be reasonable and necessary for the conservation of the fishing." 70 Wash. 2d 245, 262, 422 P. 2d 754, 764.

On review of that decision we held that, as provided in the Treaty of Medicine Creek, the "right of taking fish, at all usual and accustomed grounds and stations [which] is . . . secured to said Indians, in common with all citizens of the Territory" extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S., at 398, 392. We found the state court decision had not clearly resolved the question whether barring the "use of set nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase in common with" as used in the Treaty. *Id.*, 401–403.

In Washington the Department of Fisheries deals with salmon fishing while steel head trout are under the jurisdiction of the Department of Game. On our remand the Department of Fisheries changed its regulation to allow Indian net fishing for salmon in the Puyallup River (but not in the bay nor in the spawning areas of the river). The Department of Game, however, continued its total prohibition of net fishing for steel head trout. The Supreme Court of Washington upheld the regulations imposed by the Department of Fisheries which as noted were applicable to salmon; and no party has brought that ruling back here for review. The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout. We granted the petitions for certiorari. — U. S. —.

The Supreme Court of Washington, while upholding the regulations of the Department of Game prohibiting fishing by net for steel head in 1970, 80 Wash. 2d 561, 497 P. 2d 171, held (1) that new fishing regulations for the Tribe must be made each year, supported by "facts and data that show the regulation is necessary for the conservation" of the steel head; (2) that the prohibition of net fishing for steel head was proper because "the catch of the steel head sports fishing alone in the Puyallup River leaves no more than a sufficient number of steel head for escapement necessary for the conservation of the steel head fishing in that river." *Id.*, at 573.

The ban on all net fishing in the Puyallup River for steel head [1] grants in effect the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

We know from the record and oral argument that the present run of steel head trout is made possible by the planting of young steel head trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. The Washington Supreme Court said:

> "Mr. Clifford J. Millenback, Chief of the Fisheries Management Division of the Department of Game, testified that the run of steelhead in the Puyallup River drainage is between 16,000 and 18,000 fish annually; that approximately 5,000 to 6,000 are native run which is the maximum the Puyallup system will produce even if undisturbed; that approximately 10,000 are produced by the annual hatchery plant of 100,000 smolt; that smolt, small

[1] "ANNUAL CATCH LIMIT—STEELHEAD ONLY: Thirty steelhead over 20" in length . . ." 1970 Game Fish Seasons and Catch Limits, 3 (Dept. of Game).

steelhead from 6 to 9 inches in length, are released in April, and make their way to the sea about the first of August; that during this time all fishing is closed to permit their escapement; that the entire cost of the hatchery smolt plant, exclusive of some federal funds, is financed from licensee fees paid by sports fishermen. The record further shows that 61 per cent of the entire sports catch on the river is from hatchery planted steelhead; that the catch of steelhead by the sports fishery, as determined from "card count" received from the licensed sports fishermen, is around 12,000 to 14,000 annually;[2] that the escapement required for adequate hatchery needs and spawning is 25 per cent to 50 percent of the run; that the steelhead fishery cannot therefore withstand a commercial fishery on the Puyallup River." 80 Wash. 2d, at 572.

At oral argument counsel for the Department of Game represented the catch of steel head that were developed from the hatchery program were in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the cost of that program was financed by the license fees of sports fishermen. Whether that issue will emerge in this ongoing litigation as a basis for allocating the catch between the two groups, we do not know. We mention it only to reserve decision on it.

At issue presently is the problem of accommodating net fishing by the Puyallups with conservation needs of the river. Our prior decision recognized that net fishing by these Indians for commercial purposes was covered by the Treaty. 391 U. S. 398–399. We said that "the

[2] The Washington Supreme Court noted "that subtantially all the steel head fishing occurs after their entrance into the respective rivers to which they return." 80 Wash. 2d, at 575.

manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided the regulation . . . does not discriminate against the Indians." *Id.*, 398. There is discrimination here because all Indian net fishing is barred and only hook and line fishing, entirely pre-empted by non-Indians, is allowed.

Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook and line fishermen now catch all the steel head which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger

pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets.

We reverse the judgment below insofar as it treats the steel head problem and remand the case for proceedings not inconsistent with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 72–481 AND 72–746

Department of Game of the State of Washington, Petitioner, 72–481 *v.* The Puyallup Tribe et al. Puyallup Tribe, Petitioner, 72–746 *v.* Department of Game of the State of Washington.	On Writ of Certiorari to the Supreme Court of Washington.

[November 19, 1973]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring in the opinion and judgment.

I agree that consistently with the Treaty commercial fishing by Indians cannot be totally forbidden in order to permit sports fishing in the usual volume. On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.